

**MJC City Development Sdn Bhd v
Everise Departmental Store Sdn Bhd**

HIGH COURT (KUCHING) — SUIT NO 22-30 OF 1998 III(II)
MUHAMMAD KAMIL J
10 SEPTEMBER 1998

Civil Procedure — *Striking out* — *Pleadings* — *Defendant terminated agreements with plaintiff* — *Plaintiff claimed specific performance of agreements* — *Application to strike out defendant's statement of defence* — *Whether defendant's defence was scandalous, frivolous or vexatious*

The plaintiff entered into sale and purchase agreements ('the agreements') with the defendant whereby the defendant agreed to purchase certain buildings which were to be constructed by the plaintiff. The defendant terminated the agreements on the ground, inter alia, that the plaintiff had breached the terms of the agreements by commencing the piling works without first obtaining approval from the relevant authority. The plaintiff conceded that there was a breach of the agreements but the breach did not go to the root or affect the fundamental terms of the contract and did not render the agreements void on the ground of illegality. The plaintiff applied for an order that the statement of defence be struck out under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') in that it was scandalous, frivolous or vexatious. Counsel for the plaintiff went through his 51 pages of written submission and scrutinized and discussed all the grounds relied upon by the defendant to terminate the agreements in the most assiduous manner. A number of authorities were also cited to clarify and distinguish the substantive issues of law concerning fundamental breach and illegality in a contract.

Held, dismissing the application:

Where it entailed a minute examination of the documents concerned and a detailed recital of the relevant terms in the agreements, the provisions for striking out under the summary procedure as provided under O 18 r 19 of the RHC ought not to apply. It was also impossible to determine conclusively on the submission and affidavit evidence that the ground relied upon by the defendant to terminate the agreements was unsustainable. Further, the plaintiff's application was vague and imprecise as it did not specify the actual offending part of the pleading to be struck out. The failure of the plaintiff to indicate precisely which offending part should be struck out not only rendered the plaintiff's application as misconceived but also put the court in a predicament as to which paragraphs were to be struck out. Further, it is a well settled principle of law that in determining whether any pleading should be struck out, each paragraph as contained therein must be considered together and not in isolation. In the circumstances, it could not be said that the relevant parts of the defendant's defence were scandalous, frivolous or vexatious or may

- A** prejudice, embarrass or delay the fair trial of the action or otherwise an abuse of the process of the court (see pp 48A–B, D, H–I and 49A–C, E–F).

[Bahasa Malaysia summary]

- B** Plaintiff telah mengikat perjanjian jual beli (‘perjanjian-perjanjian tersebut’) dengan defendan yang mana defendan bersetuju membeli bangunan tertentu yang akan didirikan oleh plaintiff. Defendan menamatkan perjanjian-perjanjian tersebut atas alasan, antara lain, bahawa plaintiff telah melanggar syarat perjanjian-perjanjian tersebut
- C** dengan memulakan kerja-kerja memantakkan tiang tanpa mendapatkan kelulusan daripada pihak berkuasa yang relevan terlebih dahulu. Plaintiff bersetuju bahawa terdapat kemungkiran perjanjian-perjanjian tersebut tetapi kemungkiran itu tidak menjejaskan dasar atau syarat-syarat asasi kontrak tersebut dan tidak menyebabkan perjanjian-perjanjian tersebut menjadi tak sah atas alasan kepenyalahan undang-undang. Plaintiff memohon untuk satu perintah bahawa pernyataan pembelaan dibatalkan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 (‘KMT’) dalam ertikata bahawa ia adalah melampau, remeh atau menyusahkan. Peguam plaintiff telah meneliti penghujahan bertulis sebanyak 51 muka surat dan mentafahus serta membincangkan kesemua alasan yang digunakan oleh defendan untuk menamatkan perjanjian-perjanjian tersebut dalam cara yang amat teliti sekali. Sebilangan autoriti juga telah disebut bagi menjelas dan membezakan isu-isu undang-undang substantif mengenai kemungkiran asasi dan kepenyalahan undang-undang dalam suatu kontrak.

- F** **Diputuskan**, menolak permohonan:

- Di mana pemeriksaan teliti ke atas dokumen-dokumen berkenaan dan sebutan permulaan terma yang relevan dalam perjanjian-perjanjian tersebut secara terperinci dikehendaki, peruntukan untuk pembatalan di bawah penghakiman terus seperti yang didapati di bawah A 18 k 19 KMT tidak patut terpakai. Adalah juga mustahil untuk menentukan secara muktamad atas penghujahan dan keterangan affidavit bahawa alasan yang digunakan oleh defendan untuk menamatkan perjanjian-perjanjian tersebut tidak boleh dipertahankan. Seterusnya, permohonan plaintiff adalah samar-samar dan tidak tepat kerana ia tidak menetapkan bahagian pliding sebenar yang hendak dibatalkan. Kegagalan plaintiff untuk menunjukkan dengan tepatnya bahagian yang manakah harus dibatalkan bukan sahaja menyebabkan permohonan plaintiff salah tanggap tetapi juga meletak mahkamah dalam keadaan serba salah mengenai perenggan yang manakah harus dibatalkan. Selanjutnya, ia merupakan prinsip undang-undang yang mantap bahawa dalam menentukan sama ada mana-mana pliding harus dibatalkan, setiap perenggan seperti yang terkandung dalamnya mestilah dipertimbangkan bersama dan bukan secara berasingan.
- G**
- H**
- I**

Dalam keadaan begini, it tidak boleh dikatakan bahawa bahagian-bahagian relevan pembelaan defendan adalah bersifat skandal, remeh dan menyusahkan atau boleh memprejudis, memalukan atau menanggungkan perbicaraan adil tindakan itu atau sebaliknya merupakan penyalahgunaan proses mahkamah (lihat ms 48A-B, D, H-I dan 49A-C, E-F).]

Notes

For a case on striking out pleadings, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 4338.

Cases referred to

Alliance (Malaya) Engineering Co Sdn Bhd, Singapore v San Development Sdn Bhd [1972] 2 MLJ 100 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)

Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 3) [1969] 3 All ER 897 (refd)

Sivagami Achi v PRM Ramanathan Chettiar & Anor [1959] MLJ 221 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 29 r 1, O 32 r 13(1)(b)

Paul Tang (Tan Yap & Tang) for the plaintiff.

Stanley Eddy (Battenberg & Talma) for the defendant.

Muhammad Kamil J: This is an application by the plaintiff dated 8 June 1998 (encl 61) under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') and also under the inherent jurisdiction of the court.

In this application, the plaintiff sought an order that the amended statement of defence of the defendant herein redated 15 May 1998 and rejoinder and amended reply to defence to counterclaim also redated 15 May 1998, so far as they relate to the claim of the plaintiff for specific performance of the 36 sale and purchase agreements ('the said agreements') entered into between the plaintiff and the defendant, and/or alternatively damages for breach of the said agreements, be struck out. Consequently, the plaintiff also prayed for judgment to be entered against the defendant for specific performance of the said agreements and/or damages to be assessed and costs. The said application is supported by the affidavit in support of Ng Chee Kin, a company director of the plaintiff and affirmed on 5 June 1998. In addition, by a notice of intention to use an affidavit taken out by the plaintiff on 12 June 1998 pursuant to O 32 r 13(1)(b) of the RHC, notice was given of the plaintiff's intention to use the 11 affidavits as mentioned in the said notice at the hearing of the present application.

A The defendant did not file any fresh affidavit in connection with the instant application. However, on 19 June 1998 and 4 August 1998 respectively, the defendant took out two separate notices of intention to use affidavits in respect of the affidavits as mentioned in the said two notices at the hearing of the present application.

B In this case, the plaintiff is the developer of a project called the Batu Kawah New Township located at Lot 94, Block 217, Kuching North Land District. The plaintiff entered into 36 sales and purchase agreements with the defendant whereby the defendant agreed to purchase 36 units of shoplots, office lots and apartment lots which are to be constructed by the plaintiff. The said agreements were dated between 9 October 1997 to 13 November 1997.

C However, on 21 January 1998 and 26 January 1998 respectively, Messrs Battenberg and Talma, the solicitors acting for the defendant and purportedly also for the other groups of purchasers, wrote to the plaintiff terminating, inter alia, the 36 sale and purchase agreements entered between the plaintiff and the defendant herein.

D In view of the termination, the plaintiff commenced this action against the defendant, claiming that the defendant had wrongfully terminated the said agreements, thereby leading the plaintiff to suffer loss and damages as a result thereto. The plaintiff also claimed that the defendant had maliciously and wrongfully procured and induced the other purchasers to terminate their respecting sale and purchase agreements with the plaintiff.

E Amongst the reliefs set out by the plaintiff in the statement of claim, there is a prayer for specific performance of the 36 sale and purchase agreements and in the alternative, damages for breach of the said agreements.

F It must be noted that after having commenced this action against the defendant, the plaintiff took out an ex parte summons in chambers dated 19 February 1998 (encl 4) for an order of interim injunction against the defendant under O 29 r 1 of the RHC. The order for interim injunction was granted by this court on 21 February 1998 which prohibits the defendant from doing:

- G**
- (a) any act which, whether directly or indirectly, causes or procures a breach or breaches by any purchasers in the project of the plaintiff known as the Batu Kawah New Township being constructed on Lot 94 Block 217 Kuching North Land District, of contracts made whether now or hereafter with the plaintiff for the purchase of any shoplots, office lots or apartment lots in the project of the plaintiff known as the Batu Kawah New Township constructed on Lot 94 Block 217 Kuching North Land District; and
- H**
- (b) from issuing statements intended or calculated to prejudice or undermine confidence of any banking or financial institutions in the provision of finance to any purchaser in the project of the plaintiff known as the Batu Kawah New Township being constructed on Lot 94 Block 217 Kuching North Land District or to allow drawdown
- I**

of the loans already taken out by any purchaser or to induce the belief in the general public that the project of the plaintiff known as the Batu Kawah New Township being constructed on Lot 94 Block 217 Kuching North Land District is in jeopardy.

A

The defendant subsequently applied to set aside the said order for interim injunction on 23 March 1998. The application was heard on 22 June 1998 and in my written decision delivered on 13 August 1998, I have held that upon the evidence adduced before this court and also on the balance of convenience, the order for interim injunction should remain in force until the trial of this action.

B

Coming back to the present application of the plaintiff for striking out, it was currently pointed out from the outset by learned counsel for the defendant that there is no such document known as the amended statement of defence filed by the defendant in connection with this action, as referred to by the plaintiff. The actual document meant by the plaintiff must be the defence and amended counterclaim redated 15 May 1998. The rejoinder and amended reply to defence to counterclaim redated 15 May 1998 was correctly mentioned in the body of this application.

C

D

In connection with the present application, I have actually noted in the notes of proceedings that it took some one hour and 40 minutes for learned counsel for the plaintiff to go through his 51 pages of written submission. Learned counsel for the plaintiff scrutinized and discussed all the grounds purportedly relied upon by the defendant to terminate the said agreements in the most assiduous manner. In addition, considerable effort also went into the research of the legal principles involved, in view of the number of authorities cited in support of the plaintiff's contentions.

E

When addressing the first ground relied upon by the defendant to terminate the said agreements, learned counsel for the plaintiff implicitly highlighted the underlying basis in which the allegation was raised by the defendant. It is the allegation of the defendant that the plaintiff had breached the express and implied terms as contained in the said agreements when piling or construction of the project was commenced by the plaintiff without first obtaining approval from the relevant authority for the building plans. Learned counsel for the plaintiff, after having agreed to the undisputed fact that the plaintiff commenced piling in December 1997 before the grant of the special permission by the Padawan Municipal Council, went on further to submit at para 9, p 20 of his written submission as follows:

F

G

It is submitted that the act of the plaintiff in commencing piling and completing piling before the grant of special permission by the Padawan Municipal Council on 24 January 1998 for early commencement of building operations even if it is a breach of the respective agreements is not a fundamental term or a breach which goes to the root of the contract.

H

Evidently, it could be inferred that learned counsel for the plaintiff must have conceded that there was a breach of the said agreements by the plaintiff but that the said breach did not go to the root or affect the fundamental

I

A terms of the contract. Learned counsel further insisted that the breach also did not render the said agreement between the plaintiff and the defendant void on the ground of illegality.

At this juncture, it is useful to repeat that, apart from the inherent jurisdiction of this court, this application by the plaintiff is essentially made under O 18 r 19 of the RHC which provides:

- B**
- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
 - (a) it discloses no reasonable cause of action or defence, as the case may be; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the Court;

and may order the action be stayed or dismissed or judgment to be entered accordingly, as the case may be.

D It is pertinent to note that the plaintiff is not relying on O 18 r 19(1)(a) as one of its grounds in the present application but only on the three remaining grounds therein.

In *Mallal's Supreme Court Practice* (2nd Ed) Vol 1 at p 222 under the heading 'Frivolous or vexatious', the learned author explained that:

E By this is meant a case which is obviously frivolous or vexatious or obviously unsustainable, per Lindley LJ in *Attorney-General of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274. The pleading must be 'so clearly frivolous that to put it forward would be an abuse of the court.' Per Jeune P in *Young v Holloway* [1895] P 87 at p 90.

F In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, Mohamed Dzaiddin SCJ, in delivering the decision of the (then) Supreme Court, reiterated the principles applicable in an O 18 r 19 application in the following terms:

G The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co* [1892] 3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors* [1965] 1 WLR 1238, [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in *pari materia* with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86).

H

I The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

Where it entailed a minute examination of the documents concerned and a detailed recital of the relevant terms in the said agreements by learned counsel for the plaintiff, to suggest that the defendant's case is a frivolous and vexatious one, surely, the provisions for striking out under the summary procedure as provided in O 18 r 19 ought not to apply. In furtherance thereto, learned counsel for the plaintiff even conceded that 'there was impropriety in the early commencement of the piling works before special permission was obtained'.

As explained earlier, a number of authorities were also cited by learned counsel for the plaintiff to clarify and distinguish the substantive issues of law involved in the present action concerning fundamental breach and illegality in a contract. In view of the extensive materials made available in the written submission, a considerable amount of effort must have been expended by learned counsel for the plaintiff in the process thereto.

As such, it is quite impossible to determine conclusively on the submission and affidavit evidence, that the first ground relied upon by the defendant to terminate the said agreements was 'obviously unsustainable'.

The foregoing reasons are by themselves sufficient to entitle the defendant to succeed and that the plaintiff's application under O 18 r 19 or under the inherent jurisdiction of the court herein be dismissed. However, there is another point which this court is of the view that the defendant ought to be allowed to defend this action. The point concerned is in relation to the order sought by the plaintiff in the present application. The relevant part of the order prayed for in the plaintiff's application is worded as follows:

... that the defence of the defendant in its amended statement of defence herein redated 15 May 1998 and rejoinder and amended reply to defence to counterclaim redated 15 May 1998 *so far as relating to the plaintiff's claim for specific performance of the sale & purchase agreements pleaded in para 5 of the statement of claim herein dated 16 February 1998 and/or alternatively, for damages for breach of the said agreements be struck out* and that judgment be entered against the defendant for specific performance of the said agreements and/or for damages to be assessed with liberty to the plaintiff to apply with costs including the costs of this application to be taxed and to be paid by the defendant to the plaintiff. (Emphasis added.)

In the light of the abovesaid order sought by the plaintiff, learned counsel for the defendant submitted that the plaintiff's application herein is both vague and imprecise as it did not specify the actual offending part of the pleadings to be struck out. In support of his contention, learned counsel for the defendant referred this court to the explanation in *The Supreme Court Practice* (1985) Vol 1 at p 304, where the case of *Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 3)* [1969] 3 All ER 897 was cited by the learned author. In that case, his Lordship Buckley J held that:

When a party to an action seeks to obtain an order striking out some part of his opponent's pleading, it is, in my judgment, incumbent on him to indicate clearly what he wants to be struck out.

- A** Hence, the failure of the plaintiff to indicate precisely which offending part of the defendant's relevant pleading which should be struck out not only renders the plaintiff's application as misconceived, but also puts the court in a predicament as to which paragraphs in the defence and amended counterclaim and rejoinder and amended reply to defence to counterclaim, both redated 15 May 1998, are to be struck out, if this court is to accede to the plaintiff's application.
- B**

- Moreover, it is a well settled principle of law that in determining whether any pleading should be struck out, each paragraph as contained therein must be considered together and not in isolation (see *Sivagami Achi v PRM Ramanathan Chettiar & Anor* [1959] MLJ 221 and *Alliance (Malaya) Engineering Co Sdn Bhd, Singapore v San Development Sdn Bhd* [1972] 2 MLJ 100). The application of the abovesaid principle would further compound the task of the plaintiff in the instant application as the reliefs of the plaintiff are not only limited to the claim of specific performance and/or damages but also include injunction, damages for inducing other purchasers to break their respective agreements with the plaintiff and also damages for conspiracy. Inevitably, the plaintiff's application, in this context, would pose an insurmountable obligation to this court to serve through all the paragraphs in the relevant pleadings of the defendant and to determine which one of them is to be struck out.
- D**

- E** In the circumstances, it could not be said that the relevant part of the defendant's defence and amended counterclaim and rejoinder and amended reply to defence to counterclaim are scandalous, frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action or otherwise an abuse of the process of the court. The plaintiff's application herein, dated 8 June 1998, be hereby dismissed with costs of the defendant and to be taxed unless agreed.

- F** *Plaintiff's application dismissed.*

Reported by Jafisah Jaafar

G

H

I